IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 557

THOMAS W. LAMONT,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 8, 1946.

Opinions Below

The opinion of the Tax Court (R. 27-36) is reported in 3 T. C. 1217. The opinion of the Circuit Court of Appeals (R. 41-52) is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 8, 1946 (R. 53). The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 935.

Questions Presented

There are two questions presented in this case.

1. Whether or not Petitioner is entitled under the Revenue Act of 1936 to offset against his individual capital gains his distributive share of the capital losses of partnerships of which he was a member during the taxable year.

2. Whether or not the Circuit Court of Appeals for the Second Circuit had authority, under the rule laid down by this Court in *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), to reverse the decision of the Tax Court of the United States.

Statement

During the year 1937 taxpayer was a member of the partnership doing business in New York under the name of J. P. Morgan & Co., and doing business in Philadelphia under the name of Drexel & Co. and filing its Federal income tax return under the name of J. P. Morgan & Co.-Drexel & Co. Taxpayer's share of the ordinary net taxable income of this partnership for the year 1937 was $65,076.18. During the year 1937 J. P. Morgan & Co.-Drexel & Co. sustained a loss on the sale of capital assets of $1,825,885.40 after giving effect to the provisions of §117(a) of the Revenue Act of 1936. Taxpayer's distributive share or interest in the partnership in 1937 was 9.980335% (R. 27). Accordingly taxpayer's distributive share of the partnership's capital loss for 1937 was approximately $182,229.48. To the extent of $2,000 this partnership capital loss was

reflected in computing the net income of said partnership and taxpayer's distributive share therein (R. 27). Taxpayer was likewise a member of Syndicates which have been held to be partnerships and which also sustained capital losses in excess of $2,000, though smaller in amount than those sustained by J. P. Morgan & Co. (R. 27-28).

During 1937 taxpayer individually realized capital gains of $131,441.72 and sustained individual capital losses of $76,191.76 after giving effect to the provisions of § 117(a) of the Revenue Act of 1936, thus leaving a balance of $55,249.96 individual net capital gains (R. 28). The sole issue here is whether under the Revenue Act of 1936 taxpayer is entitled to offset against his individual net capital gains of $55,249.96, his distributive share of capital losses of the partnerships. All other issues were disposed of by concession or abandonment.

The Commissioner determined that the taxpayer was not entitled to make such offset. The Tax Court, however, decided in favor of the taxpayer and held that he was entitled to make such offset (R. 27-36). The Circuit Court of Appeals reversed, holding that he was not entitled to the offset (R. 41-52).

Specification of Error to be Urged

1. The Circuit Court of Appeals erred in holding that taxpayer was not entitled to offset against his individual capital gains his distributive share of capital losses of partnerships of which he was a member.

2. The Circuit Court of Appeals erred in holding that it was authorized to reverse the decision of the Tax Court.

Reasons for Granting the Writ

1. The decision of the Circuit Court of Appeals presents a conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Jennings* v.

Commissioner, 110 F. (2d) 945 (1940); cert. denied 311 U. S. 704. In the *Jennings* case the Circuit Court of Appeals held that § 23(g) of the Revenue Act of 1936 limiting the deduction of losses from wagering transactions to the amount of gains from such transactions, did not prevent a taxpayer from offsetting wagering losses realized in an individual capacity against wagering gains realized through a partnership of which he was a member. This conflicts with the holding of the Circuit Court of Appeals in this case denying taxpayer the right to make such an offset under sections 23(j) and 117(d) of the Revenue Act of 1936 which provide a limitation with respect to security losses similar to that contained in § 23(g) with respect to wagering losses.

2. The decision of the Circuit Court of Appeals is contrary to the decision of this Court in *Neuberger* v. *Commissioner,* 311 U. S. 83 (1940) and accordingly is a decision of a question "in a way probably in conflict with applicable decisions of this Court."[1] In the *Neuberger* case this Court held that under the Revenue Act of 1932 taxpayers were entitled to an offset similar to that here contended for, and there is no change in the provisions of the 1936 Act permitting a different result.

3. The holding of the Court below that issues of statutory interpretation are not within the rule of the *Dobson* case, is contrary to the decisions of this Court in the cases of *Commissioner* v. *Bedford Estate,* 325 U. S. 283 and *McDonald* v. *Commissioner,* 323 U. S. 57; is contrary to the decisions of other circuits in *Commissioner* v. *Bryer et al.,* 151 F. (2d) 267 (C. C. A. 3) and *Commissioner* v. *Jones Company,* 152 F. (2d) 358 (C. C. A. 6); and is contrary to the decisions of the Court below in the cases of *Kirschenbaum et al.* v. *Commissioner,* 155 F. (2d) 23 and *Brooklyn National Corporation* v. *Commissioner,* —— F. (2d) —— (C. C. A. 2).

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[1] Supreme Court rule 38.5(b).

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit sitting at New York, N. Y., commanding said Court to certify and send up to this Court on a date to be designated a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order, judgment and decree of the Circuit Court of Appeals be reversed by this Honorable Court, and that your Petitioner be granted such other and further relief in the premises as to this Honorable Court may seem just.

Dated: September, 1946.

Thomas W. Lamont,
Petitioner
By Walter S. Orr
Counsel

BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Jennings v. Commissioner*, 110 F. (2d) 945.

The question presented in the *Jennings* case was the right of a taxpayer under the Revenue Act of 1936, the Act here involved, to offset his individual wagering losses against his distributive share of wagering gains realized by a partnership of which he was a member. Section 23(g) of the Revenue Act of 1936 provided: "Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions." In the *Jennings* case the Commissioner contended that the partnership income must be computed separately from the individual partner's, and that the partner could not offset wagering losses against his distributive share of the partnership wagering gains. The Circuit Court of Appeals, however, decided that the offset was permissible in spite of the limitation.

The question presented in this case is the right of a taxpayer under the Revenue Act of 1936 to offset against his individual security gains his distributive share of security losses realized by a partnership of which he was a member. Section 117(d) of the Revenue Act of 1936 provided that:

> "Losses from sales or exchanges of capital assets shall be allowed only to the extent of \$2,000 plus the gains from such sales or exchanges."

Section 23(j) provided that losses from the sale or exchange of capital assets should be allowed only to the extent provided in § 117(d).

The issue in the *Jennings* case and in this case is the same, namely whether the limitation provisions contained in § 23(g) or § 23(j) of the 1936 Act prevent members of partnerships from offsetting items of income or deductions governed by the limitation sections against similar items realized in their individual capacity.

This Court has already recognized the conflict between the *Jennings* case and the present case. In *Neuberger* v. *Commissioner,* 311 U. S. 83, the Court had before it the question of whether or not a taxpayer could offset losses from the sale of securities held less than two years against his distributive share of profits from the sale of such securities realized through a partnership of which he was a member. Section 23(r)(1) of the Revenue Act of 1932 provided that the losses from sales or exchanges of such securities should be allowed "only to the extent of the gains from such sales or exchanges". Section 23(r)(1) of the 1932 Act was therefore a limitation section similar to § 117(d) of the 1936 Act here involved. The Circuit Court of Appeals for the Second Circuit in the *Neuberger* case had held that the offset contended for was not permissible, 104 F. (2d) 649. This Court granted certiorari in the *Neuberger* case "because of substantial conflict with *Jennings* v. *Commissioner,* 110 F. (2d) 945, and *Craik* v. *United States,* 31 Fed. Supp. 132", 311 U. S. 83, 85.[2] This Court reversed the Circuit Court of Appeals and allowed the offset. This Court thus recognized that the decision in *Jennings* v. *Commissioner,* dealing with the limitation of wagering losses, conflicted with the decision in *Neuberger* v. *Commissioner,* relating to the limitation on security losses, *even though the two cases arose under different revenue acts.*

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[2] As indicated by the language quoted, there is also a conflict in principle between the decision of the Circuit Court of Appeals below and the decision of the Court of Claims in *Craik* v. *United States,* 31 F. Supp. 132, decided under the Revenue Act of 1918. In view, however, of the greater factual and statutory similarity of the *Jennings* case to the present case, it is not believed necessary to stress the more general conflict between this case and the *Craik* case. Compare *United States* v. *Coulby,* 258 Fed. 27 (C. C. A. 6 1919).

The action of the Court in granting certiorari in the *Neuberger* case requires similar action here. Since the decision of the Circuit Court of Appeals in the *Neuberger* case relating to the offset of security gains and losses *under the 1932 Act* was held to conflict with the decision in the *Jennings* case relating to the offset of wagering gains and losses *under the 1936 Act*, it must necessarily follow that the decision of the Court below relating to the offset of security gains and losses *under the 1936 Act* conflicts with the decision in the *Jennings* case *under the same Act*. The recognition by this Court of the conflict between the *Jennings* case and the *Neuberger* case shows that this Court recognizes no difference in principle between limitations with respect to wagering losses and limitations with respect to security losses.

The Court below completely misconceived the significance of the *Jennings* case. Although the *Jennings* case was cited by the Tax Court (R. 33) and pressed by the taxpayer on brief, the Court relegated the discussion thereof to a footnote, saying (R. 47):

> "The opinion below also cites *Jennings* v. *Commissioner of Internal Revenue*, 5 Cir., 110 F. (2d) 945; cert. denied; *Helvering* v. *Jennings*, 311 U. S. 704; but this was the case approved and followed in the *Neuberger* case and adds nothing more."

This is to overlook the fact that the *Jennings* case arose under the 1936 Act, the Act under which the case herein arose. Indeed, the issue in the present case is whether the rule laid down by this Court in the *Neuberger* case under the 1932 Act is applicable under the 1936 Act. Therefore the *Jennings* case is, in substance, a decision on the precise issue involved in this case.

POINT II

The decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *Neuberger* v. *Commissioner*, 311 U. S. 83 (1940).

It will be seen from the discussion under Point I that the decision in the Circuit Court of Appeals below is in apparent conflict with the decision of this Court in the case of *Neuberger* v. *Commissioner, supra.* In that case this Court approved the *Jennings* case and decided the *Neuberger* case in a way which it believed to have been in accordance with it. Obviously, if the decision of the Court below conflicts with the *Jennings* case it must also conflict with the decision of this Court in the *Neuberger* case.

The issue in the *Neuberger* case is set forth on page 8, *supra,* and it is apparent that the decision therein should control the present case. If, under the 1932 Act, a member of a partnership could offset his distributive share of partnership security losses against his individual security gains, it must follow, in the absence of some provision of the 1936 Act requiring a different result, that the present taxpayer is entitled, under the 1936 Act, to offset his distributive share of partnership security losses against his individual security gains. This was recognized by the government itself in its brief in the *Neuberger* case in this Court, the government saying, pages 18 and 19:

> "Yet the occasion for such an offset was the same under the 1934 and 1936 Acts as under the 1932 Act here involved * * *. And if any such general principle as that for which petitioner contends were valid, the right to make such an offset would be clear in the absence of a specific provision forbidding the offset. *But the 1934 and 1936 Acts may be searched in vain for any such provision.*" (emphasis ours)

The absence of any relevant differences between the 1936 Act and the 1932 Act was also recognized by the Tax Court in its decision in this case (R. 36).

"* * * we cannot in logic construe the decisions in the *Neuberger* and *Mosbacher* cases and the Revenue Acts in such a way as to justify a conclusion that under the 1936 Revenue Act partnership capital losses may not be offset against individual capital gains when it is clear that they may be under the 1932 and 1938 Acts, *and no material differences appear in any of the Revenue Acts from 1932 to 1938 which affect the taxation of partnership income.*" (emphasis ours)

The above statements, in the government's brief in the *Neuberger* case and in the opinion of the Tax Court, that there are no material differences between the 1932 and 1936 Acts, are, it is submitted, correct. There are set forth in the appendix the provisions of the two Acts relating to the taxation of partnerships. A comparison of these provisions shows that there is nothing which has been added or omitted in the 1936 Act which would permit a result different from that obtained under the 1932 Act. The Court below was unable to find any specific provision in the 1936 Act preventing the offset contended for by the taxpayer (R. 52).

In the place of any specific statutory provision, the Court below relied on four arguments to justify its reversal of the Tax Court.

1. *The omission of § 186 of the 1932 Act from the 1936 Act.* Section 186 of the 1932 Act provided:

> "§ 186. *Capital Net Gains and Losses.* In the case of members of a partnership the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101(a) and (b), relating to capital net gains and losses."

This provision was omitted from the 1934 and 1936 Acts. However, there are two reasons why this omission is entirely without significance in the present case:

(a) Section 186 of the 1932 Act related to *capital net gains* and *capital net losses,* and concededly did not apply to the short term gains or losses covered by § 23(r)(1) of the 1932 Act, which were before this Court in the *Neuberger* case. Accordingly, this Court's decision in that case was not based upon the presence of § 186 in the 1932 Act. The omission of § 186 from the 1936 Act, with its resulting inapplicability to the gains and losses here involved, can obviously have no more significance in this case than the section's inapplicability to the types of gains and losses there involved had in the *Neuberger* case.

(b) The committee reports on the 1934 Act show that the omission of § 186 from that Act and from the 1936 Act was not caused by any change in the concept of the taxation of partnerships, but by a change in the technique in treating capital gains and losses.[3] The committee reports on the 1934 Act state with respect to the omission of § 186:

> "This section is omitted on account of the change in policy in taxing capital gains and losses." *House Ways and Means Committee Report,* 73d Congress Second Session, H.R.—No. 704, page 33; *Senate Finance Committee Report,* same Congress, S.R.—No. 558, page 40.

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[3] Under the 1932 Act gains and losses were subject to different treatment than was ordinary net income, the maximum tax on capital gains being 12½%, and the maximum tax reduction on account of capital losses being 12½%. This required a segregation of capital gains and losses from ordinary net income, and § 186 of the 1932 Act provided for this segregation. The 1934 and 1936 Acts, however, provided a new technique for the taxation of gains and losses from the sale or exchange of property pursuant to which such gains and losses were taken into ordinary income to the extent of the percentage recognized, the percentage depending in turn upon the length of time for which the property had been held prior to sale. Section 117 of the 1936 Act. Such percentage was reflected in the computation of net income and became a part thereof and there was no longer any need to segregate ordinary income from capital gains or losses.

2. *Section 218(d) of the NIRA.* The Court below relied heavily (R. 44 et seq.) on §218(d) of the National Industrial Recovery Act approved June 16, 1933, 48 Stat. 195, 209, which amended §182(a) of the 1932 Act by inserting therein the following:

> "No part of any loss disallowed to a partnership as a deduction by §23(r) shall be allowed as a deduction to a member of such partnership in computing net income."

There are two reasons the above section has no bearing on this case.

(a) Section 218(d) of the NIRA was omitted in the 1934 and 1936 Acts and accordingly cannot govern the present issue.

(b) Even if §218(d) were in the 1936 Act, it would not govern the present case, since by its terms it was not applicable to the capital gains and losses here involved, but was limited to the short term security gains and losses covered by §23(r)(1) of the 1932 Act.

3. *Committee Reports.* The position of the Court below, when analyzed, is, in effect, that if §218(d) of the NIRA had been included in the 1936 Act, and had been changed so as to cover the type of security losses here involved, the government's position would be correct, and that, although no such provision was included in the 1936 Act, the committee reports, and related material[4] show that Congress

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[4] The Court below also cited the Regulations under the 1936 Act as supporting its construction (R. 50). An examination of the Regulations cited by the Court below, Articles 181-1, 182-1, 183-1, 184-1, 187-1 and 187-2 of Regulations 94, fails to show wherein they throw any light at all upon the present question. They do not contain any references whatsoever to capital gains and losses, except a passing reference in Article 183-1 which is more favorable to taxpayer than otherwise. The question of applying these Regulations to the present issue is exactly the same as applying the statute to the present issue, and the Regulations in question offer no aid in the solution of this problem.

would have included such a provision if its attention had been called to the precise question here involved. Such a position implies the power of a court to supply an omisison from the statute. Under the principles laid down by this Court the power to construe legislation does not extend so far. Committe reports cannot supply matter that is missing from the statute. Committee reports are not legislation, but merely an interpretation of legislation. All the intent in the world cannot supply the place of appropriate statutory language. As stated by this Court in *Iselin* v. *United States,* 270 U. S. 245, 251:

> "What the government asks is not a construction of a statute, but in effect an enlargement of it by the Court so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

This language was cited with approval by this Court in *Wallace* v. *Cutten,* 298 U. S. 229, 237. The principle was applied in *Osaka Shosen Line* v. *United States,* 300 U. S. 98, 101; *Helvering* v. *City Bank Farmers Trust Company,* 296 U. S. 85.

However, conceding arguendo, its relevance, the Court below misread the legislative history here involved. The committee reports and related statements in connection with the 1934 Revenue Act,[5] relied on by the Court below, do not show that Congress intended to forbid the offset here contended for. They show merely that Congress was trying to limit the extent to which losses on the sales of securities could be deducted from income from other

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[5] The relevant changes from the 1932 Act occurred in the 1934 Act. The relevant provisions of the 1934 Act were continued in the 1936 Act.

sources.[6] The loss in revenue as the result of unlimited deductibility of security losses was the situation referred to by the Court below (R. 47-49) which came out in the 1933 hearings of the Senate Committee on Banking and Currency. The availability of security losses as deductions against ordinary income was not limited to partnerships,

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[6] Ways and Means Committee Report on the Revenue Bill of 1934 (H. Rep. No. 704 pages 17-18) in which the Committee stated that the principal loss of revenue from partnerships:

> "* * * had occurred by reason of the fact that the partnerships in question had realized losses from the sales of securities which the individual partners were permitted to deduct against *their income from other sources*" (italics ours).

Similarly, Congressman Hill in his statement before the House explaining the bill, stated that under the bill (78th Cong. Record part 3, page 2663):

> "We confine the capital loss deductions to capital gains and do not permit any net capital losses to be offset against the *ordinary income* of the individual partners" (italics ours).

Senator Harrison in introducing the bill in the Senate stated that a loss of revenue from partnerships had occurred by reason of the fact that "losses from the sales of securities by partnerships were permitted as a deduction against the *incomes from other sources* of the individual partners" (78th Cong., Record part 6, page 5847).

The Court below accepted the Government's contention that the phrases "other sources" and "ordinary income" referred to individual income as distinguished from partnership income (R. 50, footnote (5)). It is believed, however, that the phrases, not only in the context used, but in other income tax contexts, clearly refer to income other than income from gains or losses. See § 186 of the Revenue Act of 1932, Appendix, page iii, in which the statute divides net income into "ordinary net income, capital net gain or capital net loss".

and such deductions were equally available to individuals.[7] However, since the extent of this practice was first brought out in an investigation of partnerships, it became associated in the public mind with partnerships.

However, there is no indication in the legislative history that Congress intended to prevent the offsetting of partnership security gains or losses against the individual security gains or losses of the partners. Such a practice cannot be even remotely considered an abuse or evasion of the tax laws. It is expressly permitted under present law. Internal Revenue Code, § 183. As stated by this Court in the *Neuberger* case, *supra*, p. 88:

> "If the individual losses are actually incurred in similar transactions, it cannot justly be said that the same deduction is taken a second time, or that the real purpose of the statute, which is ultimately to tax the net income of the individual partner, would thereby be impaired."

On the contrary, the failure to allow such an offset results in a grave inequity to taxpayers who conduct part of their business through a partnership.[8]

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[7] Testimony of Roswell Magill, House hearings before the Committee on Ways and Means, Revenue Bill 1934, 73d Cong. 2d Session, pages 111-112. Mr. Magill. "I do not think that the deduction of losses in that case [Morgan & Company] was due so much to the fact that it was a partnership as it was due to certain other incidents of that situation."

[8] See Statement of the Acting Secretary of the Treasury regarding the Preliminary Report of a Subcommittee of the Committee on Ways and Means, December 15, 1933, page 13: "So long as the partner must report all partnership income, he should be permitted to deduct the corresponding partnership losses. The losses now deductible are not fictitious or imaginary and do not represent either evasion or avoidance of the income tax". See also statement by Judge Swan in his dissenting opinion in *Johnston* v. *Commissioner*, 86 F. (2d) 732 (C. C. A. 2 1936) in which he anticipated the holding of this Court in the *Neuberger* case: "I cannot imagine any reason why the Congress should wish to tax a man more if he made gains in conjunction with a partner than if both gains and losses were wholly individual."

It is true that expressions in the committee reports relating to the 1938 Revenue Act indicate that the writers thereof believed that the correct interpretation of the 1936 Act was that contended for by the Commissioner here. This belief is, however, undoubtedly accounted for by the fact that at the time the committee report was written on March 1, 1938, the decisions of the lower courts on the question involved in the *Neuberger* case stood in the law reports unreversed and the committee draftsmen naturally accepted these decisions as representing a correct version of the law, and failed to anticipate the overruling of them by this Court in the *Neuberger* case. Prior to the decision of this Court in the *Neuberger* case in 1940 it was generally believed that in computing the income of partners and partnerships under the 1932 Act, noncapital security losses of the partnership could not be offset against the partners' noncapital security gains in view of the limitation imposed by section 23(r)(1) of the 1932 Act. This position was taken by the Treasury Department in 1935 in *G. C. M. 14012,* XIV-1, C. B. 145 and *I. T. 2892,* XIV-1, C. B 148. This position was supported by the decision of the Tax Court in *Percy Johnston,* 34 B. T. A. 276, decided in April 1936, which was affirmed by the influential Circuit Court of Appeals for the Second Circuit in *Johnston* v. *Commissioner,* 86 F. (2d) 732, decided in December 1936 and in which certiorari was denied, 301 U. S. 683. The decision in the *Johnston* case was accepted as law and was followed by the Court of Claims in *Klingenstein* v. *United States,* 18 F. Supp. 1015, decided in 1937 and by the Tax Court in the *Neuberger* case, 37 B. T. A. 223, decided on January 22, 1938 just a month before the Ways and Means Committee Report on the 1938 Act.

Of course, if, as indicated by these lower court decisions, the proper construction of the 1932 Revenue Act was that the limitation of § 23(r)(1) with respect to noncapital losses prevented the deduction by partners of their distributive share of partnership noncapital losses from their individual noncapital gains, it would follow that the corresponding limitation on capital losses contained in § 117(d)

of the 1934 and 1936 Acts would prevent partners from deducting their distributive share of partnership capital losses against individual capital gains, and it was on this assumption that the statement in the committee report on the 1938 Act was obviously written. The Court's decision in the *Neuberger* case reversed the underlying basis of this assumption, and accordingly the statements in the committee reports are of no significance.

This explanation of the 1938 committee reports was accepted as correct by the Tax Court below (R. 34-36).[9]

4. *The dictum of this Court in the Neuberger case.* The above comments with respect to the committee reports in the 1938 Act apply equally to the *dictum* of this Court in the *Neuberger* case, *supra*, pp. 89, 90. This is shown by the fact that the *dictum* referred to *G. C. M. 14012,* XIV-1 C. B. 145, and *I. T. 2892,* XIV-1 C. B. 148, which took a position under the 1932 Act directly contrary to the holding of this Court in the *Neuberger* case. It is obvious that any reference that may be drawn from the action of Congress based on these rulings becomes worthless when the rulings themselves turn out to have been wrong. In any event, the remarks of this Court on this point were not necessary to the decision of the case, were pure *dicta* and are not entitled to weight compared with an analysis of the applicable statutory provisions. This Court has often warned that state-

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[9] The amendments themselves to the 1938 Act, as distinguished from committee reports as to the effect thereof, throw no light whatever upon the interpretation of the 1936 Act. The insertion in the 1938 Act of §§ 182 and 183, which correspond with § 186 of the 1932 Act, resulted from the fact that under the Revenue Act of 1938 capital gains and losses were again segregated from ordinary income as they were under the 1932 Act, as distinguished from their treatment under the Revenue Acts of 1934 and 1936, where, after being reduced by certain percentages, they were included in the taxpayer's ordinary income. The restoration of the technique of treating capital gains to that prevailing under the 1932 Act is the explanation for inserting in the partnership sections provisions segregating capital gains similar to those in the 1932 Act.

ments in its opinions not necessary to the decision of the question before it do not govern the Court when the precise question comes before it at some later time. The classic expression of this rule is that of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheaton, 264, 399, in which he stated:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This statement has been recently applied by this Court. *Osaka Shosen Line* v. *United States*, 300 U. S. 98, 103; *Armour & Company* v. *Wantock*, 323 U. S. 126, 132, 133; *Puerto Rico* v. *Shell Company*, 302 U. S. 253, 268; *Humphrey's Executor* v. *United States*, 295 U. S. 605, 626.

POINT III

The holding of the Court below that issues of statutory interpretation are not within the rule of the *Dobson* case is contrary to the decisions of this Court in the cases of *Commissioner* v. *Bedford Estate,* 325 U. S. 283 and *McDonald* v. *Commissioner,* 323 U. S. 57, and is contrary to the decisions of other circuits in *Commissioner* v. *Bryer et al.,* 151 F. (2d) 267 (C. C. A. 3) and *Commissioner* v. *Jones Company,* 152 F. (2d) 358 (C. C. A. 6) and is contrary to the decisions of the Court below in the cases of *Kirschenbaum et al.* v. *Commissioner,* 155 F. 2(d) 23 and *Brooklyn National Corporation* v. *Commissioner,* —— F. (2d) —— (C. C. A. 2).

This Court in the case of *Dobson* v. *Commissioner,* 320 U. S. 489 (1943), greatly limited the scope of the review by the Circuit Courts of Appeals of decisions of the Tax Court.

The Court below disposed of the question of the applicability of the *Dobson* rule to this case by saying (R. 43):

> "Since this [issue] is a matter of statutory interpretation, it is a case, on the Commissioner's contention, of 'a clear cut mistake of law'. *Commissioner of Internal Revenue* v. *Wilcox,* 66 S. Ct. 546, 550 and hence within our power of review, notwithstanding the limitations stated in *Dobson* v. *Commissioner of Internal Revenue,* 320 U. S. 489."

Thus the Court below held that issues of statutory interpretation were outside the scope of the *Dobson* rule and that any conclusion with respect thereto reached by the Tax Court which differed from the conclusion reached by the Court of Appeals would constitute a "clear cut mistake of law" on the part of the Tax Court.

The position that issues of statutory interpretation are without the scope of the *Dobson* rule, is contrary to this

Court's decisions in *Commissioner* v. *Bedford Estate,* 325 U. S. 283 and *McDonald* v. *Commissioner,* 323 U. S. 57.

The issue in *Commissioner* v. *Bedford Estate, supra,* was whether a cash distribution in connection with a recapitalization of a corporation was taxable as a dividend or as a distribution in partial liquidation under the provisions of § 112(c) of the Revenue Act of 1936, the Act here involved. There was no dispute as to the facts and the only question was the correct interpretation of the relevant statutory provisions. The Tax Court held that the distribution was taxable as a dividend. This was reversed by the Circuit Court of Appeals for the Second Circuit. This Court reversed the Circuit Court's decision and approved the decision of the Tax Court. The Court said, page 292:

> "As is true of other teasing questions of construction raised by technical provisions of Revenue Acts, the matter is not wholly free from doubt, but these doubts would have to be stronger than they are to displace the informed views of the Tax Court."

In *McDonald* v. *Commissioner, supra,* the issue was whether or not campaign expenditures could be deducted either as business expenses under § 23(a) or as losses under § 23(e) of the Code. There was no dispute as to the facts involved and the question was purely one of statutory interpretation. The Tax Court and the Circuit Court of Appeals decided in favor of the Commissioner. This Court affirmed. After reviewing the relevant statutory background the Court said, page 64:

> "Even if these conclusions, in the setting of Federal income tax legislation, derived less easily than they do from the statutory provisions under scrutiny, we should not be inclined to displace the views of the Tax Court with our own. * * * But as a system, tax legislation is not to be treated as though it were loose talk or presented isolated abstract questions of law cast-

> ing upon the Federal courts the task of independent construction. Tax language normally has an enclosed meaning or has legitimately acquired such by the authority of those specially skilled in its application."

See also *Kelly Company* v. *Commissioner,* 326 U. S. 521, 526, (1945), for a further statement by this Court on the extent of the *Dobson* rule.

Other Circuit Courts of Appeals have held that decisions of statutory interpretation are within the scope of the *Dobson* rule. The Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Bryer et al,* 151 F. (2d) 267 applied the *Dobson* rule to a decision of the Tax Court on the issue of whether or not interest on tax deficiencies paid by a transferee of assets was deductible under § 23(b) of the Internal Revenue Code. Obviously such a question is a "clear cut question of law".

The Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Jones Company,* 152 F. (2d) 358 applied the *Dobson* rule to the question of whether § 113(b) of the Revenue Act of 1934 required a taxpayer to reduce the cost basis of its subsidiary's stock by the amount of the subsidiary's net losses availed of on consolidated returns. This was also a "clear cut question of law." See also *Raffold Process Corporation* v. *Commissioner,* 153 F. (2d) 168 (C. C. A. 1 1946); *Perry* v. *Commissioner,* 152 F. (2d) 183 (C. C. A. 8 1945); *Heller* v. *Commissioner,* 147 F. (2d) 376 (C. C. A. 9 1945).

Finally the decision of the Court below is in conflict with two of its own decisions handed down about the same time.[10] In *Kirschenbaum* v. *Commissioner,* 155 F. (2d) 23

[10] Note the recent statement of Judge Learned Hand in *Molnar* v. *Commissioner,*—F. (2d)—(C. C. A. 2 1946): "* * * for it is as much a function of the Supreme Court to decide differences within a circuit as between circuits".

and *Brooklyn National Corporation* v. *Commissioner,*—F. (2d)—, the Court below gave dramatic examples of the extent to which it felt itself bound by decisions of the Tax Court on questions of law. In each of these cases the Tax Court had decided a question of law in a way contrary to a prior decision on the same question by the Court below. In each case the Court below held that, though it would continue to follow its prior decision on appeals from a District Court, it did not feel justified in reversing the decision of the Tax Court in the case before it. In *Brooklyn National Corporation* v. *Commissioner, supra,* the Court explained its understanding of the *Dobson* rule as follows:

> "But the Supreme Court has repeatedly admonished us (in so many decisions that it would be idle to repeat them), that our power to review a ruling of the Tax Court is very much more limited than in the case of a district court. As we understand it, before we may substitute our own interpretation of a provision of the Revenue Act, not only must a naked question of law detach itself from the nexus of law and fact in the record as a whole; but we must conclude that the Tax Court has been indubitably wrong in its decision of the question which emerges: reasonable differences in legal opinion we are to resolve in its favor.

It is submitted that, in the light of the above decisions by this Court, by other Circuit Courts of Appeals and by the Court below itself, the opinion of the Tax Court in this case was entitled to greater weight than it was given by the Court below. Under the proper test, the Court below should not have stopped with merely deciding that the issue was one of statutory interpretation. It should have further weighed the extent to which the Tax Court's interpretation of the statute was a reasonable one with some basis in law.

This case, presenting, as it does, a "teasing question" of the construction of the technical provisions of the Rev-

enue Acts, which the Tax Court is peculiarly fitted to make, seems particularly appropriate for the application of the *Dobson* rule.

Respectfully submitted,

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APPENDIX

Statutes

Revenue Act of 1932

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions: * * *

(r) Limitation on Stock Losses.—

(1) Losses from sales or exchanges of stocks and bonds (as defined in subsection (t) of this section) which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges (including gains which may be derived by a taxpayer from the retirement of his own obligations). * * *

Supplement F—Partnerships

Sec. 181. Partnership not Taxable.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

Sec. 182. Tax of Partners.

(a) General Rule.—There shall be included in computing the net income of each partner his distributitive share, whether distributed or not, of the net income of the partnership for the taxable year. If the taxable year of a partner is different from that of the partnership, the amount so included shall be based upon the income of the partnership for any taxable year of the partnership ending within his taxable year.

(b) Partnership Year Embracing Calendar Years with Different Laws.—If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and

the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

(1) the rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

(2) the rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year.

Sec. 183. Computation of Partnership Income.

The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except that the so-called "charitable contribution" deduction provided in section 23(n) shall not be allowed.

Sec. 184. Credits Against Net Income.

The partner shall, for the purpose of the normal tax be allowed as a credit against his net income, in addition to the

credits allowed to him under section 25, his proportionate share of such amounts of dividends and interest specified in section 25(a) and (b) as are received by the partnership.

SEC. 185. Earned Income.

In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement.

SEC. 186. Capital Net Gains and Losses.

In the case of the members of a partnership the proper part of each share of the net income which consists, respectively, of ordinary net income, capital net gain, or capital net loss, shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary, and shall be separately shown in the return of the partnership and shall be taxed to the member as provided in this Supplement, but at the rates and in the manner provided in section 101(a) and (b), relating to capital net gains and losses.

SEC. 187. Net Losses.

The benefit of the special deduction for net losses allowed by section 117 shall be allowed to the members of a partnership under regulations prescribed by the Commissioner with the approval of the Secretary.

SEC. 188. Taxes of Foreign Countries and Possessions of United States.

The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in section 131.

SEC. 189. Partnership Returns.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

NATIONAL INDUSTRIAL RECOVERY ACT OF JUNE 16, 1933

Section 218(d)—Effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: "No part of any loss disallowed to a partnership as a deduction by section 23(r) shall be allowed as a deduction to a member of such partnership in computing net income."

REVENUE ACT OF 1936

SEC. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions * * *:

(g) Wagering Losses.—Losses from wagering transactions shall be allowed only to the extent of gains from such transactions. * * *

(j) Capital Losses.—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117(d). * * *

SEC. 117. Capital Gains and Losses.

* * *

(d) Limitation on Capital Losses.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. * * *

Appendix V

Supplement F—Partnerships

Sec. 181. Partnership Not Taxable.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

Sec. 182. Tax of Partners.

There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year.

Sec. 183. Computation of Partnership Income.

The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual.

Sec. 184. Credits Against Net Income.

The partner shall, for the purpose of the normal tax, be allowed as a credit against his net income, in addition to the credits allowed to him under section 25, his proportionate share of such amounts (not in excess of the net income of the partnership) of interest specified in section 25(a) as are received by the partnership.

Sec. 185. Earned Income.

In the case of the members of a partnership the proper part of each share of the net income which consists of earned income shall be determined under rules and regulations to be prescribed by the Commissioner with the approval of the Secretary and shall be separately shown in the return of the partnership.

SEC. 186. **Taxes of Foreign Countries and Possessions of United States.**

The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of the member of a partnership to the extent provided in section 131.

SEC. 187. Partnership Returns.

Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

SEC. 188. Different Taxable Years of Partner and Partnerships.

If the taxable year of a partner is different from that of the partnership, the distributive share of the net income of the partnership to be included in computing the net income of the partner for his taxable year shall be based upon the net income of the partnership for any taxable year of the partnership (whether beginning on, before, or after January 1, 1936) ending within the taxable year of the partner.

JUDICIAL CODE—SEC. 240(A) AS AMENDED
U. S. C. TITLE 28, SEC. 347.

Sec. 347. (Judicial Code, section 240, amended.) **Certiorari to circuit courts of appeals and Court of Appeals of**

District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.